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VIA Electronic Mail

September 11, 2019

Mr. Taylor Scott Amarel
MuckRock News
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Re: Final Appellate Determination Denying FOIA Appeal No. 2019-432

Dear Mr. Amarel:

This letter constitutes the final determination of the Consumer Financial Protection Bureau regarding your appeal of the Bureau's response to Freedom of Information Act (FOIA) Request CFPB-2019-423-F (the Request).¹ For the reasons set forth below, the appeal is denied.

I. Background

On July 16, 2019, the Bureau received the Request seeking:

"[C]opies of the past 50 emails sent to, from, or copied to whistleblower@cfpb.gov containing the non-case-sensitive key-strings: "EB-5"."

¹ The Bureau's FOIA regulations are codified at 12 C.F.R. §§ 1070.10 *et seq.* Pursuant to these regulations, the authority to determine FOIA appeals rests with the Bureau's General Counsel or her delegate. See 12 C.F.R. § 1070.21(e). The General Counsel has delegated to me the authority to determine the appeal of the Bureau's response to the Request. This letter therefore constitutes the Bureau's final response to the Request.

On July 23, 2019, the Bureau transmitted its response to the Request (the Response). The Response provides that the Bureau can neither confirm nor deny the existence of records responsive to the Request. On August 14, 2019 you filed this appeal challenging the failure to produce responsive records and requesting specific information regarding the number of pages identified, the “full FOIA log,” and “an index of exemptions for the records.”

II. Appellate Determination

The Request sought information provided to the Bureau’s electronic mailbox for whistleblower communications. CFPB Bulletin 2011-05 provides guidance to the public on the Bureau’s whistleblower program. The Bulletin solicits information from sources with knowledge about potential violations of federal consumer financial laws. It welcomes whistleblower information and other law enforcement tips “from current or former employees of potential violators, contractors, vendors, and competitor companies.” The Bulletin further recognizes the need of some whistleblowers to provide their information anonymously and allows for the anonymous transmission of information by email to whistleblower@cfpb.gov. And the Bulletin assures those who make anonymous submissions that “[t]o the extent consistent with law enforcement needs the Bureau will not disclose your identifying information and will maintain your confidentiality as permitted by federal laws such as the Privacy Act, the Freedom of Information Act and any applicable Bureau regulation.” *See CFPB Bulletin 2011-05 (Enforcement and Fair Lending), Dec. 15, 2011, available at https://files.consumerfinance.gov/f/2011/12/CFPB_Enforcement_Bulletin_12-15-11.pdf.*

The Bureau relied on Exemption 7 to withhold all responsive records. Exemption 7(C) allows an agency to withhold material that was compiled for law enforcement purposes when disclosure of that material “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C). Applying Exemption 7(C), the Supreme Court found that a third-party’s request for law enforcement records pertaining to a private citizen categorically invades that citizen’s privacy. *See DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 777 (1989). And where the third-party’s request seeks no official information about the federal agency, the privacy invasion is unwarranted. *Id.*

Under this framework, Exemption 7(C) applies to protect from disclosure the emails that you requested. The threshold requirement of Exemption 7(C) is met because the requested emails are law enforcement records that were compiled for law enforcement purposes. *See Rural Housing Authority Alliance v. U.S. Dept. of Agriculture*, 498 F.2d. 73, 80-83 (D.C. Cir. 1974). Moreover, because your Request did not seek information about the operation of the Bureau, disclosure of the requested emails is an unwarranted invasion of the privacy of any potential whistleblower who transmitted information to the Bureau’s whistleblower@cfpb.gov inbox. Exemption 7(C) applies to protect the identity of individuals who provide information to a law enforcement agency about potential violations of law. *McCutchen v. U.S. Dept. of Health and Human Svs.*, 30 F.3d 183, 189 (D.C. Cir. 1994) (“complainants have a strong privacy interest in remaining anonymous because, as ‘whistle-blowers,’ they might face retaliation if their identities were

revealed”). And, where Exemption 7(C) applies to protect an individual’s identity from disclosure, all personally identifiable information about the individual may be withheld. *See Nat'l Whistleblower Ctr. v. U.S. Dept. of Health and Human Svs.*, 849 F. Supp. 2d 13, 30 (D.D.C. 2012); *Sorin v. U.S. Dept. of Justice*, 280 F. Supp. 3d 550, 564 (D.D.C. 2017).

In addition, the Bureau’s Response to your Request appropriately refused to confirm or deny the existence of emails to, from or copied to the whistleblower@cfpb.gov inbox containing the keyword “EB-5”. FOIA’s “exemptions cover not only the content of protected records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption.” *Larson v. Dep’t of State*, 565 F.3d 857, 861 (D.C. Cir. 2009). An agency may, therefore, “refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a [] FOIA exception.” *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal quotation marks and citation omitted). In other words, such a response is appropriate where an agency’s confirmation of the existence of a record would cause the very harm that a specific exemption is intended to prevent. If the Bureau were to deny the existence of law enforcement records pertaining to a particular person or company when it could do so, then that would indicate that a response like this one – that the Bureau can neither confirm nor deny the existence of responsive records – was in fact a statement that records pertaining to the person do exist. This “Glomar” response is, accordingly, appropriate.

Because disclosure of the existence of the requested emails would have confirmed that information regarding the requested keyword was transmitted to the Bureau’s whistleblower mailbox, the Bureau appropriately refuse to confirm or deny the existence such emails.

For the foregoing reasons, the appeal is denied.

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If you are dissatisfied with the Bureau’s final appellate determination, you may contact the Office of Government Information Services (OGIS), which offers mediation services to resolve disputes between FOIA requesters and Federal agencies pursuant to 5 U.S.C. § 552(h)(3). Using OGIS services does not affect your right to pursue litigation. Under 5 U.S.C. § 552(a)(4)(B), you may also seek judicial review of this appeal denial in the U.S. District Court where you reside, in the district where the documents are located, or in the District of Columbia.

 Digitally signed by
Steven Y. Bressler
Date: 2019.09.11
16:39:51 -04'00'

Steven Y. Bressler
Assistant General Counsel for
Litigation and Oversight